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RANGANATHAN BOOK SYMPOSIUM SYMPOSIUM

Ranganathan Book Symposium: Part 3

Jan Klabbers: Conflicts as Solutions

JAN KLABBERS — 4 April, 2016

Some years ago, I published a slender book on the topic of treaty conflict. Zooming in on the treaty relations of member states of the EU, I found that international law had little to say about treaty conflicts involving different parties. If party A has incompatible treaty obligations with states B and C, then it just has to make a choice or, as a German scholar (and later EU judge) put it in the 1970s, what then applies is *Das Prinzip der politischen Entscheidung* – the principle of political decision. While many have recorded their frustration with the incapacity of international law to decide such issues, to me it also had a positive consequence: it allows a space for the conduct of politics.

That was pretty much where I left things, but fortunately Surabhi Ranganathan picked up on the idea and developed it further. For, if treaty conflicts allow space for politics, then it follows – so she hypothesized – that this space itself can be instrumentalized. In other words, so Ranganathan realized, it may well be the case that states deliberately create conflicts, so as to mould existing regimes into something more responsive to their current interests or needs. And she set out to investigate this further. The result was, first, an impressive PhD thesis (disclosure: I was one of her examiners), and second, an even more impressive revised version of that thesis in book form, under the title *Strategically Created Treaty Conflicts and the Politics of International Law*, published last year (2015) by Cambridge University Press.

When the ILC was busy drafting the Vienna Convention on the Law of Treaties and its provisions on treaty conflict, much energy was spent on downplaying the intentional creation of treaty conflicts. For, if conflicts were created intentionally, then the law would have a problem: surely, any intentionally created conflict would have to be regarded as a possible breach of the earlier treaty, and therewith give rise to inapplicability – perhaps even invalidity – of the later treaty. Such a prism might create an easily applicable rule ('the older treaty always prevails'), but at considerable expense. First, such a rule would only cover part of the matter it ought to cover: the drafters were well aware that often enough, conflicts also come about unintentionally, even as they tried to downplay this. Second, and arguably of greater relevance, such a rule would make international law into a truly conservative force: any normative change would become very difficult, and practically subjected to the veto of even the smallest state. Even Hersch Lauterpacht, among

ILC special rapporteurs the one with the greatest sympathy for prioritizing the *lex prior* (so much so that he thought that incompatible later treaties should be considered invalid), already realized the need to create a large exception (or loophole, in colloquial terms) for treaties concluded in the common interest: here, the later in time should prevail. Needless to say, making the distinction involves policing the borderline between the two, which would have created its own problems. Perhaps as a result, Lauterpacht's successors as special rapporteurs, Gerald Fitzmaurice and in particular Humphrey Waldock, changed course.

On other points too, the ILC felt that the matter had to be defused, or sanitized. In addition to presuming that treaty conflict would be rare, and rarely intentional, it was considered that treaty conflicts would merely affect parts of a treaty. Hence, leaving entire treaties unapplied would be overkill (let alone invalidating them), so much so that the title of the most relevant article in the Vienna Convention (article 30), speaks no longer of conflicting treaties, but merely of conflicting obligations.

The ILC probably had to do its best to downplay the strategic creation of treaty conflicts: otherwise, no rule would ever have seen the light of the day. Ranganathan, however, is under no pressure to create a regime: her task is to make sense of one, and in this she succeeds wonderfully well. She takes three examples where states wittingly pushed conflicts through so as to adapt the overarching law. The first of these is the re-working of part of the UN Convention on the Law of the Sea so as to change the deep seabed mining regime. As is well-known, the original agreement was considered too socialist by the Reagan administration and a bunch of other states, which then

started a movement to amend the Convention before it had even entered into force. With a great eye for detail and the illustrative anecdote, Ranganathan tells the story of this process. She then does something similar with the immunity agreements concluded between the US and a variety of states parties to the International Criminal Court Statute (the so-called 'article 98 agreements') and with the India-US nuclear deal against the background of the nuclear-governance regime.

This calls for a number of comments. First, there is considerable variety between her chosen examples. The UNCLOS deal involved a number of states, some of which had signed the convention, while others had not. Either way, it concerned primarily prospective parties to a multilateral regime acting *inter se*. The article 98 agreements, by contrast, were concluded by parties to the ICC Statute, in each case with a single third party: the US. The nuclear deal also involved a third party setting, but this time (arguably) in reverse: a party to the Non-Proliferation Treaty (the US) used the deal to nudge a non-party (India) somewhat closer to the core of the regime.

Second, while all three episodes can be regarded as treaty conflict, they can also be framed differently, and it is one of the problems with the Vienna Convention's regime (probably inevitably so, given the Convention's focus on treaties as instruments rather than obligations) that it leaves this possibility wide open. The UNCLOS episode could be seen as a modification between some of the parties, something perfectly allowed by the Vienna Convention (provided some conditions are met); the surprising thing then is, above all, that the modification took place prior to the Convention's entry into force. Indeed, the late Jonathan Charney once

analyzed it from the point of view of the obligation not to defeat the object and purpose of a treaty pending ratification or entry into force, and that is a radically different frame. Likewise, while the article 98 agreements can be seen, as Ranganathan sees them, as embodying treaty conflicts, one can also view them, far more innocently, as subsequent practice by the parties in their relations with the outside world. This would probably be too rosy a picture, but still: it would not be completely eccentric. And by the same token, the US-India nuclear deal could well constitute subsequent practice too. The point is not (emphatically not) that Ranganathan is mistaken in viewing these manifestations as treaty conflict; the point is, instead, that different frames are possible, and sometimes plausible, as well, and that the choice for a particular frame, both by the actor and by the academic observer, is itself a political act.

Third, the involvement of the US in all three examples suggests that raw power – and the willingness to use it – may enter the picture. From the liberal cosmopolitan perspective, the three US positions in Ranganathan's example represent the good (nudging India into the nuclear regime), the bad (undermining the ICC through immunity agreements) and the ugly (substituting profit for solidarity in deep seabed mining). The point that subtly comes across then is precisely that power can be used for different purposes, good and bad (or even ugly). The hero of one setting is another setting's villain. As a result, Ranganathan suggests that there is little point in looking at power and politics monolithically – and that is a powerful, if largely subliminal, message to send.

Fourth, she suggests persuasively that law was not only the chosen battleground for these intensely political disputes,

but also that the arms used on the ground were thoroughly law-oriented. All parties made all sorts of legality claims in favour of their respective positions, and produced all sorts of documents to back up their claims: Ranganathan wittily refers to this as document-rattling. In short, not only is the law intensely political, the political is likewise intensely legal, and short of using guns, canons and rockets, states typically use their legal arsenal to substantiate their political claims.

These four comments inevitably lead to a fifth, however subliminal perhaps again. Ranganathan's study is, essentially, a sophisticated doctrinal study, but of the sort that would not have been conceivable even as recently as three decades ago. It is informed – coloured – by the insight that international law is highly political and politicized and, more fine-grained, that seemingly dry and technical issues such as treaty conflicts can become the theatre of grand political battles – which in turn are fought by legal means. Whereas earlier doctrinal studies – and still quite a few these days as well – would have taken treaty conflicts at face value ('there are conflicting obligations; we have to find a solution, and by all means let us not lapse into politics"), she compellingly makes clear that these conflicts were never in search of a solution: instead, the conflicts *were* the solutions for the parties that instigated them. Heuristically, this insight would not have been possible without the platform offered by the emergence in the late 1980s of both critical legal studies (the works of Kennedy and Koskenniemi, in particular) and of constructivism in the study of international relations (Kratochwil, Onuf and others). Hence, perhaps the main contribution Ranganathan makes is to demonstrate by example that theoretically informed doctrinal work can truly be highly valuable. It is sometimes thought, or so it seems, that since the late 1980s the only good academic work in

international law is either piggybacking on international relations approaches or social theory in disguise, about the role of law in the greater scheme of things. Blissfully, Ranganathan carves out a different space for doctrinal work, without ignoring theoretical concerns, and while acknowledging that international law and politics cannot be understood in strict separation. In short, she makes clear that law and politics need not be antagonistic in legal studies but can be combined to great effect without lapsing into sterility and a-historicity, like so much work does these days, whether doctrinal, critical, or rationalist in inspiration. And that in itself is a remarkable achievement.

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ISSN 2510-2567

Tags: *International Legal Theory*, *Law of treaties*, *Norm Conflicts*

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